APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1007—August Term, 1994

(Argued March 16, 1995 Decided Aug. 21, 1995)

Docket No. 94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION; ASSICURAZIONI GENERALI; EXCESS AND CASUALTY REINSURANCE ASSOCIATION; and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S and FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

Before OAKES, CARDAMONE and ALTIMARI, *Circuit Judges.*

OAKES, *Senior Circuit Judge*:

This appeal is by the North River Insurance Company ("North River") from a final order of the United States District Court for the Southern District of New York,

Charles S. Haight, Jr., *Judge*, denying a motion to confirm and granting a cross-motion to vacate an arbitration award on the grounds that an earlier order of the court consolidating two separate arbitrations into one was beyond the scope of the court's powers after our decision in *Government of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), thus invalidating the arbitration. Because *Boeing* did not, in a real sense, change the law of this circuit and because the reinsurers chose not to appeal the district court's original order consolidating the arbitrations, and because a balance of the equities requires that the award stand, the district court abused its discretion in reopening its prior order and vacating the arbitration award. Judgment reversed and case remanded.

BACKGROUND

North River insured GAF Corporation ("GAF") under a liability policy in effect for three annual policy periods commencing May 1, 1970. GAF was subsequently involved in many lawsuits in which it paid damages arising out of exposure to its asbestos products. North River's policy obligated it to cover such claims in the amount of $5 million in each of the three policy periods. Consequently, it paid out a total of $15 million to GAF.

Appellees are domestic and foreign reinsurers. The domestic reinsurers are Philadelphia Reinsurance Corporation, Reinsurance Corporation of New York, and Assicurazioni Generali and Excess and Casualty Reinsurance Association (the "U.S. reinsurers"). The foreign reinsurers are Underwriters and Underwriting Syndicates at Lloyd's of London, and foreign companies subscribing to reinsurance contract no. R64939 (the "London reinsurers"). The U.S. and London reinsurers, along with seven other reinsurers, reinsured GAF under so-called "treaty programs" in effect during the three annual policy periods at issue.

A reinsurance treaty is an ongoing contractual relationship between two insurance companies in which the pri-

mary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Under a treaty, a reinsurer agrees to indemnify a primary insurer with respect to a portion of the primary insurer's liability in a designated line of business. In this case, which is, apparently, typical, the reinsurance treaty involved the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

The London reinsurers participated only in so-called "second layer treaties" involving a layer of $4 million of coverage in excess of a $1 million per occurrence. They agreed to an aggregate endorsement which gave North River certain options to combine products liability claims and submit them to the London reinsurers for coverage under various formulae. The aggregate endorsement was not included in the treaties to which the U.S. reinsurers subscribed.

North River, having paid GAF under its primary policies, presented claims to the reinsurers. While the seven other reinsurers paid North River, the U.S. and London reinsurers declined to pay claims, in whole or in part, contending that the asbestos claims arose from "multiple occurrences," while North River contended that only one occurrence was involved. Calculations in respect of the London reinsurers were further complicated by the effect of the aggregate endorsement.

In December 1988, North River commenced arbitration proceedings against the U.S. reinsurers, and on October 3, 1989, served a separate notice of intention to arbitrate against the London reinsurers.[1] The London reinsurers and the U.S. reinsurers chose the same arbitrator, and North River appointed the same arbitrator in both proceedings, but the two arbitrators were unable to choose a third. It was at that point, October 30, 1989, that North River commenced this independent proceeding pur-

[1] Each treaty at issue contained the same arbitration clause at Article XV thereof.

suant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994), seeking an order consolidating the two proceedings against the U.S. reinsurers and the London reinsurers, appointing a third arbitrator or "umpire," and compelling the reinsurers to proceed. The U.S. reinsurers and the London reinsurers, while having agreed to single arbitrations between the members of each group, objected to consolidation of the two separate proceedings before one panel of arbitrators.

In a memorandum opinion and order dated May 23, 1991, Judge Haight overruled the reinsurers' objections and ordered a consolidated arbitration, relying on *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976). *Nereus* held that under Fed. R. Civ. P., Rules 42(a) and 81(a)(3) and in light of the liberal purposes of the FAA, a district court could consolidate arbitration proceedings over the objection of the parties involved. *Id.* at 975. Judge Haight did not enter a judgment implementing this opinion, nor was he asked to do so by the parties, and while the U.S. reinsurers and the London reinsurers had opposed consolidation when the district court ordered it, they did not appeal the order. In a subsequently issued opinion and order dated July 19, 1991, the court appointed a third arbitrator and stated that the "Court will retain jurisdiction in the event of any post-award proceedings." The court again entered no judgment.

The arbitration proceeded on the consolidated basis as ordered by Judge Haight. Following discovery, hearings were held for four days in July 1993, and on October 21, 1993, the arbitration panel rendered a two-to-one award in North River's favor. On November 5, 1993, North River petitioned the district court to confirm the award under section 9 of the FAA, and on November 6, 1993, the U.S. and London reinsurers cross-moved under section 10 of the same act to vacate the award on the

strength of *Boeing*, 998 F.2d 68, which was issued on June 29, 1993. *Boeing* held that in a case in which the parties had agreed to arbitration in separate arbitration agreements, a district court may not order the arbitrations consolidated, absent the consent of the parties. *Id.* at 71-74.

The district court vacated the award and denied North River's motion to confirm it. *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 856 F. Supp. 850 (S.D.N.Y. 1994). The court noted that it was "not at all clear that this Court's May 23, 1991 opinion and order directing consolidation was appealable." *Id.* at 854. In any event, the court found, it had retained jurisdiction over the case to adjudicate any post-award applications, and had "not yet entered a final judgment." *Id.* at 855. "The Second Circuit has made it plain," the court stated, "that the law of the case doctrine may have no legitimate office to perform where a fundamental change in the governing law impacts directly upon the parties' rights and obligations." *Id.* The court held that "it is crystal clear that the Second Circuit's opinion in *Boeing* overrules that aspect of *Nereus* upon which [it] relied in directing a consolidated arbitration over the objections of the two groups of Reinsurers." *Id.* at 853. Consequently, the court vacated the order compelling a consolidated arbitration and the resulting arbitration award, and ordered two new, separate arbitrations. *Id.* at 855.

The court, lastly, held that the vacatur of the arbitration award was appropriate "whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA." *Id.* But, the court held, "if such a ground is necessary to the result . . . the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' [] contracts, in violation of § 10(d)." *Id.* The court noted that "[t]o be sure, the arbitrators acted in fulfillment of this Court's order," but, the court continued, "*Boeing* makes it clear that . . . I

exceeded my powers; and since the arbitrators derived their powers from my order, so did they." *Id.*

North River appealed.

DISCUSSION

On appeal, North River contends that the district court's order compelling arbitration on a consolidated basis was a final, appealable order, giving it *res judicata* effect and making the law of the case doctrine inapplicable. Thus, North River argues, the district court erred in vacating the order and the resulting arbitration award.

Section 16 of the FAA, the section governing the appeal of orders concerning arbitration, distinguishes between orders issued in "independent" and in "embedded" proceedings. The section provides that if the suit is "independent," *i.e.*, the plaintiff seeks an order compelling or prohibiting arbitration or a declaration of whether a dispute is arbitrable, and no party seeks other relief, a final judgment ending the action is immediately appealable. 9 U.S.C. § 16(a)(3); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). We have interpreted this section to mean that "[i]f arbitration has been ordered, the objecting party need not await the outcome of the arbitration before challenging the order to arbitrate." *Id.*

However, if the suit is "embedded," *i.e.*, a party has sought some relief other than an order requiring or prohibiting arbitration, orders prohibiting arbitration are immediately appealable, 9 U.S.C. § 16(a)(1)(A)-(C); *Filanto*, 984 F.2d at 60, but orders directing arbitration are not immediately appealable, 9 U.S.C. § 16(b); *Filanto*, 984 F.2d at 60-61.

The case before us fits squarely within the definition of an "independent" proceeding. North River initiated this action under Sections 4 and 5 of the FAA, asking the district court to compel arbitration in its disputes with the

U S. and London reinsurers. No other relief was sought, either by North River or the reinsurers. *Cf. Filanto,* 984 F.2d at 61 (order compelling arbitration in a case claiming a breach of contract is an "embedded" proceeding). Thus, the district court's order compelling arbitration on a consolidated basis was a final order and was immediately appealable. *Id.* at 60.

This is so even though the district court refrained from entering a judgment on the July 1991 order and retained jurisdiction to deal with any post-award proceedings. *North River,* 856 F. Supp. at 855. Even where a district court retains jurisdiction to enforce an arbitration award, an order compelling arbitration in an independent proceeding is final and appealable. *University Life Ins. Co. v. Unimarc Ltd.,* 699 F.2d 846, 849-50 (7th Cir. 1983); *cf. General Reinsurance Corp. v. CIBA-Geigy Corp.,* 853 F.2d 78, 80 (2d Cir. 1988). With respect to the timing of a party's appeal, the entry of judgment is a ministerial act. *See* Fed. R. App. P. Rule 4(a)(2) ("A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."); *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.,* 498 U.S. 269 (1991) (notice of appeal not fatally premature even though almost a month before entry of judgment).

As persuasively explained by Judge Posner:

> Th[is] situation actually is little different from what it would be if the district judge had not retained jurisdiction. If he had ordered arbitration, and left it at that, it would still be open to the parties . . . to go back to him for interpretation or modification of an order . . . and . . . if any of them prevailed before the arbitrators on any of their claims, to bring a fresh proceeding in the court below, under 9 U.S.C. § 9, to enforce the award. Yet if the district court had not formally retained jurisdiction, neither possibility would have made the order to arbitrate non-

> appealable. It should make no difference that, instead, the court, presumably to save the parties the bother of having to file separate actions if they want to modify or enforce the order compelling arbitration, formally retained jurisdiction . . . . The difference in procedures is minor, technical, and unrelated to the purpose of the final-judgment rule; it should not affect appealability.

University Life Ins., 699 F.2d at 850.

We find no merit in the contention of the U.S. and London reinsurers that they should not be penalized for their failure to appeal the district court's order because, at the time the order was issued, this circuit had not interpreted the 1988 amendments to the FAA which added Section 16 on appeals. As we noted in *Filanto*, 984 F.2d at 60, the distinction between "independent" and "embedded" proceedings in the 1988 amendments was not new law; it was, instead, a codification of an existing, court-created rule. *See, e.g., Manning v. Energy Conversion Devices, Inc.*, 833 F.2d 1096, 1101-02 (2d Cir. 1987) (citing, *inter alia, Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 294 (2d Cir. 1965)). Likewise, it has long been the law in this circuit that an order compelling arbitration in an independent action is an appealable order. *Id.* at 1102.

While we find that the district court's order compelling arbitration on a consolidated basis was final for the purpose of appeal, we need not decide whether the order has *res judicata* effect. Even if the proceeding in the district court was, in some respect, open and still pending, and if we apply law of the case doctrine rather than *res judicata*, the district court nonetheless abused its discretion by reopening its decision to order a consolidated arbitration and by vacating the resulting arbitration award.

Under the doctrine of law of the case, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed,

becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987). It is generally accepted that the law of the case doctrine does not limit the power of a court, but " 'merely expresses the practice of courts generally to refuse to reopen what has been decided.' " *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, *J.*)). But while a "court sometimes may review an earlier ruling, . . . [n]evertheless, because there is a strong policy favoring finality the court exercises its underlying power to review earlier rulings 'sparingly.' " *McClain v. United States*, 676 F.2d 915, 917 (2d Cir.) (citations omitted), *cert. denied*, 459 U.S. 879 (1982). A court should be "loathe" to revisit an earlier decision "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

In its opinion, the district court correctly points out that we have held that a court may depart from the law of the case "where a fundamental change in the governing law impacts directly upon the parties' rights and obligations." *North River*, 856 F. Supp. at 855 (citing *Crane Co. v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979)). We have also held, however, that the law of the case should be "disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was predicated." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (citations and internal quotations omitted), *cert. denied*, 459 U.S. 828 (1982). "[M]ere doubt . . . is not enough to open the point for full reconsideration." *Id.* (internal quotations and citation omitted).

Here, after the consolidated arbitration had already taken place, the district court reopened its decision to consolidate—a decision which the U.S. and London reinsurers did not appeal—because it found that our *Boeing* case had fundamentally changed the law of this circuit. *North River*, 856 F. Supp. at 855. However, *Boeing* did not truly act to change the law in this circuit. Instead, in *Boeing*, 998 F.2d at 72, we applied Supreme Court cases, namely *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), which had been handed down after *Nereus* but before the district court in this case ordered arbitration on a consolidated basis.

In a very real sense, *Boeing* did not overrule *Nereus*. First, the facts of *Boeing* are distinguishable in a significant way from those in *Nereus*: in *Boeing*, the parties had entered into separate contractual agreements to arbitrate, while in *Nereus* the parties were bound by the same arbitration agreement. Thus, it is entirely unclear whether the outcome of a case factually similar to *Nereus* would, after *Boeing*, be any different than it was in *Nereus* before *Boeing*.[2] Second, while in *Boeing* we held that *Nereus* was "no longer good law" to the extent that it was "based on the Federal Rules of Civil Procedure and the 'liberal purposes' of the Federal Arbitration Act," we also noted that "[w]e do not disturb *Nereus* to the extent it is based on the general equitable powers of the court and principles of contract law." *Boeing*, 998 F.2d at 74. Certainly equitable principles allow for confirmation of an award in a consolidated proceeding already had, especially when

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[2] This case, to a certain extent, falls somewhere between *Nereus* and *Boeing*. While the district court found that each reinsurer entered into separate agreements with North River, *North River*, 856 F. Supp. at 853-54, the arbitration clause in each agreement was identical, and the agreements were part of a single reinsurance treaty program.

the parties did not appeal from the order of consolidation. Third, *Boeing* was not reheard *in banc*, nor were any of the Second Circuit's procedures followed for changing the law of the circuit.

Boeing does not mandate that the district court's consolidation order be vacated in this case, after the arbitration has already gone forward. The *Boeing* court explicitly left *Nereus* untouched to the extent that it relied on the equitable powers of the court, 998 F.2d at 74, and the equities in this case require that the award from the consolidated arbitration stand. Extensive discovery has already been had in the consolidated case, and the arbitration proceedings have been completed. The U.S. and London reinsurers chose not to challenge the consolidation on direct appeal.

In addition, the *Boeing* decision came down on June 29, 1993, some weeks before commencement of the arbitration hearing and almost two months before the August 1993 award against appellees. Even if learned counsel for the reinsurers did not read the slip sheet opinions of the Second Circuit or the West advance sheets which did not come down until September, certainly the *Boeing* decision was available electronically. Beyond this, it was the subject of substantial publicity and discussion in the legal community. *See* Deborah Pines, *Consolidation of Arbitrations Invalidated; 2nd Circuit Panel Clarifies Question Splitting Judges,* N.Y.L.J., July 8, 1993, at 1; Lawrence W. Newman & Michael Burrows, *Consolidation of Arbitrations,* N.Y.L.J., July 29, 1993, at 3. Though our opinion does not turn on this sequence of events, it provides support for our conclusion that the reinsurers should be bound by the award in the consolidated arbitration.

Thus, because *Boeing* did not, in a real sense, change the law of this circuit and because the reinsurers chose not to appeal the district court's original order consolidating the arbitrations, and because a balance of the equities requires that the award stand, the district court abused its

discretion in reopening its prior order and vacating the arbitration award.[8]

CONCLUSION

The district court erred in reopening its decision to order arbitration on a consolidated basis and in vacating the resulting arbitration award. The judgment is reversed and the case is remanded to the district court for the resolution of any outstanding proceedings.

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[8] The U.S. and London reinsurers contend that the district court had the power to vacate the arbitration award under section 10(a)(4) of the FAA, which allows a district court to vacate an award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). This argument fails because section 10 does not provide an independent means of challenging the district court's order compelling a consolidated arbitration which was appealable, but which was not appealed.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN

THE NORTH RIVER INSURANCE COMPANY,
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Following an award rendered at the conclusion of a consolidated arbitration, the prevailing insurance company petitions to confirm the award. Respondents, the two groups of reinsurers against whom the award was rendered, cross-move to vacate it. They contend that this Court's order of consolidation was improvidently made, requiring vacatur; and that events occurring during the arbitration hearings demand the same result. Because I agree with respondents that recent Second Circuit authority condemns consolidation on the facts of this case, I vacate the award on that ground and reach no other issue.

Background

Petitioner North River Insurance Company ("North River") insured the GAF Corporation ("GAF"), an asbestos manufacturer, under a liability policy in effect for three annual policy periods from May 1, 1970 through April 30, 1973. During the 1980's GAF was sued in many lawsuits alleging injury from exposure to its asbestos products. North River's policy obligated it to cover such claims in the amount of $5 million for each of these three policy periods. In consequence it has paid out a total of $15 million to GAF.

Respondents are domestic and foreign reinsurers who, together with seven other reinsurers, reinsured North River under reinsurance treaty programs in effect during the three GAF annual policy periods in suit. The treaties provided a first layer of reinsurance coverage in the amount of $750,000 in excess of a $250,000 "per occurrence" retention (or deductible), and a second layer of $4,000,000 in excess of a $1,000,000 "per occurrence" retention (the first layer of coverage). A reinsurance treaty involves an ongoing contractual relationship between insurance companies, in which the primary insurer agrees in advance to cede, and the reinsurer to accept, specified business that is the subject of the contract. Typically, as in this case, a reinsurance treaty involves the participation of many reinsurers, each accepting a percentage of the total liability under a single treaty.

The present respondents fall into two groups. The "U.S. Reinsurers" include respondents Philadelphia Reinsurance Corporation, Assicurazioni Generali, Excess and Treaty Management Corporation (on behalf of the members of Excess and Casualty Reinsurance Association), and The Reinsurance Corporation of New York. The "London Reinsurers" include respondents Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939. I shall hereafter refer to respondents by their respective group names.

A reinsurer signifies its participation in a reinsurance treaty by subscribing to the treaty. In the case at bar the London Reinsurers participated only in the second layer treaties. They agreed to an "aggregate endorsement" which became a part of the treaties subscribed to by those reinsurers. The aggregate endorsement gave North River certain options in combining products liability claims and submitting them to the London Reinsurers for coverage under different formulae. The aggregate endorsement was not included in the treaties to which the U.S. Reinsurers subscribed.

Each reinsurance treaty contained an arbitration clause, appearing in Article XV, which provided:

> IF ANY DISPUTE SHALL ARISE BETWEEN THE REINSURED AND THE REINSURER WITH REFERENCE TO THE INTERPRETATION OF THIS CONTRACT OR THEIR RIGHTS WITH RESPECT TO ANY TRANSACTION INVOLVED, THE DISPUTE SHALL BE REFERRED TO THREE ARBITRATORS, ONE TO BE CHOSEN BY EACH PARTY AND THE THIRD BY THE TWO SO CHOSEN. IF EITHER PARTY REFUSES OR NEGLECTS TO APPOINT AN ARBITRATOR WITHIN THIRTY (30) DAYS AFTER THE RECEIPT OF WRITTEN NOTICE FROM THE OTHER PARTY REQUESTING IT TO DO SO, THE REQUESTING PARTY MAY NOMINATE TWO ARBITRATORS WHO SHALL CHOOSE THE THIRD. EACH PARTY SHALL SUBMIT ITS CASE TO THE ARBITRATORS WITHIN THIRTY (30) DAYS OF THE APPOINTMENT OF THE ARBITRATORS. THE ARBITRATORS SHALL CONSIDER THIS CONTRACT AN HONORABLE ENGAGEMENT RATHER THAN MERELY A LEGAL OBLIGATION: THEY ARE RELIEVED OF ALL JUDICIAL FORMALITIES AND MAY ABSTAIN

FROM FOLLOWING THE STRICT RULES OF LAW. THE DECISION OF A MAJORITY OF THE ARBITRATORS SHALL BE FINAL AND BINDING ON BOTH THE REINSURED AND THE REINSURER. THE EXPENSE OF THE ARBITRATORS AND OF THE ARBITRATION SHALL BE EQUALLY DIVIDED BETWEEN THE REINSURED AND THE REINSURER. ANY SUCH ARBITRATION SHALL TAKE PLACE IN NEW YORK, NEW YORK, UNLESS SOME OTHER LOCATION IS MUTUALLY AGREED UPON BY THE REINSURED AND THE REINSURER.

North River, having paid under its primary policies with GAF, presented claims under the treaties as it construed them to the reinsurers. The present respondents rejected North River's claims in whole or in part. A principal bone of contention related to the meaning of "single occurrence" as that phrase was used in the treaties to define North River's "retention," *i.e.*, the deductible amount. North River contended that only one occurrence was involved, namely, GAF's manufacture and sale of asbestos products, and hence only one $250,000 retention applied. The respondents contended that the asbestos claims arose from multiple occurrences, each subject to a $250,000 retention. The calculation in respect of the London Reinsurers was further complicated by the effect of the aggregate endorsement.

In December 1988, North River commenced arbitration proceedings against the four U.S. Reinsurers, who retained the same counsel to defend them, appointed the same arbitrator, Joseph F. Murphy, and by their conduct agreed to a consolidated arbitration between themselves and North River, which had appointed Vincent Vaccarello as its arbitrator. On October 3, 1989 North River served a separate notice of intention to arbitrate upon the Lon-

don Reinsurers. North River again appointed Mr. Vaccarello as its arbitrator. The London Reinsurers retained different counsel from those defending the U.S. Underwriters, but appointed Mr. Murphy as their arbitrator. It may therefore be said that the London Reinsurers agreed to a consolidated arbitration between North River and themselves.

The case first came to the attention of this Court when North River filed a petition dated October 30, 1990 under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* North River complained of the delay in selecting a third arbitrator. One sticking point arose from Mr. Murphy's insistence, in responding to the correspondence from Mr. Vaccarello, that he was speaking only for the U.S. Reinsurers, the London Reinsurers having not yet instructed him on the question of the third arbitrator. In these circumstances, North River petitioned the Court under FAA § 4 for an order directing that its arbitration with the U.S. Reinsurers be consolidated with the London Reinsurers arbitration, and appointing a third arbitrator to participate in that consolidated arbitration.

The U.S. Reinsurers and the London Reinsurers, while having agreed to a single arbitration between North River and the members of those respective groups, objected to a further consolidation of the U.S. Reinsurers and London Reinsurers arbitrations into a single proceeding before one panel of arbitrators. Respondents based that objection upon various perceived disadvantages to their respective defensive positions.

In a Memorandum Opinion and Order dated May 23, 1991, I overruled the Reinsurers' objections and ordered a consolidated arbitration. I did so specifically on the authority of the Second Circuit's decision in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 939 (1976), which in the context of a maritime contract of charterparty and a third-party guarantor of performance

directed a consolidated arbitration "in the interest of justice" because "[t]here were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings. . ." *Id.* at 976 (cited and quoted in this Court's May 23, 1991 opinion at slip op. 2-3).

The May 23, 1991 opinion also specified procedures that would be followed if Messrs. Vaccarello and Murphy could not agree on the third member of the consolidated arbitration panel.

I did not enter a judgment implementing the May 23, 1991 opinion; nor was I asked to do so. Everyone awaited developments. Messrs. Vaccarello and Murphy could not agree on a third arbitrator. This Court, following the procedures outlined in the May 23, 1991 opinion, appointed Mr. David J. Sherwood as third arbitrator in a Memorandum Opinion and Order dated July 19, 1991 which concluded with the sentence: "This Court will retain jurisdiction in the event of any post-award proceedings." I entered no judgment in respect of this opinion.

Following discovery, the hearings before the arbitrators began on July 9, 1993 and were concluded on July 12. On October 21, 1993, the arbitration panel rendered a 2-1 award in North River's favor. Mr. Murphy dissented.

On November 5, 1993 North River petitioned this Court under § 9 of the FAA to confirm the award. On November 6, 1993 the U.S. Reinsurers and London Reinsurers cross-moved under FAA § 10 to vacate it.

The Reinsurers' first ground for vacatur arises out of the Second Circuit's overruling of *Nereus* in *The Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993). The Second Circuit decided *Boeing* on June 29, 1993. West

first published the opinion in its advance sheets dated September 13, 1993. Presumably at an earlier date the opinion's text was available on-line through both Westlaw and Lexis. The court of appeals also disseminates printed slip opinions.

As alternative grounds for vacatur, respondents complain of the arbitrators' refusal to hear the testimony of one of their witnesses, and a reference by North River's counsel during the hearings to an earlier arbitration involving another of the GAF reinsurers, in alleged violation of an agreement governing the conduct of the arbitration at bar.

Discussion

Notwithstanding North River's protestations to the contrary, it is crystal clear that the Second Circuit's opinion in *Boeing* overrules that aspect of *Nereus* upon which I relied in directing a consolidated arbitration over the objections of the two groups of Reinsurers.

In *Boeing* the Second Circuit acknowledged *Nereus*'s conclusion "that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." 998 F.2d at 71. In footnote 1 on that page the court of appeals collects a number of district court cases directing consolidated arbitrations on the strength of the *Nereus* conclusion; my May 23, 1991 opinion in the instant case is one of them. But that conclusion, the court of appeals squarely holds in *Boeing*, "is no longer good law." *Id.* The rule in this circuit now is that "the district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation." *Id.* at 74. It is profitless for a district judge to analyze how the court of appeals arrived at that conclusion. I am bound by it.

In the case at bar the two groups of Reinsurers opposed consolidation. *Boeing* therefore impacts upon the case

unless it can be said that all the respondent Reinsurers were bound by the same agreement to arbitrate, or that in some manner they agreed to consolidation, notwithstanding their opposition at the time of North River's first petition to this Court.

I do not think that either proposition can be sustained. While each Reinsurer subscribed to the same treaty, the resulting arrangement was a number of separate contracts between the primary insurer on the one hand and, on the other, each reinsurer for its individually designated percentage of the total treaty liability. Those separate contracts are capable of amendment or change in manners binding only on some reinsurers and not on others; the aggregate endorsement negotiated by North River and the London Reinsurers illustrates that principle. The contractual liability of reinsurers under a reinsurance treaty is traditionally regarded as several, not joint. *See* U.S. Reinsurers' Reply Brief at 9 n.7.

Nor can the Reinsurers at bar be said to have agreed to a consolidated arbitration in their separate contracts. While the arbitration clause is the same in each subscribed treaty, it speaks in terms of disputes arising between "the reinsured and the *reinsurer*" (I have emphasized the singular form of the noun). North River did not suggest in its original petition to compel consolidation that the Reinsurers had contractually agreed to it; nor could it plausibly have done so. When a primary insurer and its several reinsurers wish to provide in their contracts for multi-party arbitration having the practical effect of consolidation, they know how to do so. Indeed, in 1981 the arbitration clause in the treaties at issue in this case was amended to provide that "[i]f more than one reinsurer is involved in the same dispute, all such reinsurers shall act as one party for purposes of this clause," an amendment which goes on to provide explicitly that it shall not be construed as "changing the liability of the reinsurers under the terms of this contract from several to joint." U.S. Reinsurers'

Reply Brief at 9 n.7. If by operation of law the Reinsurers had agreed to consolidated arbitration under the previously existing arbitration clause, there would have been no need to amend it.

Therefore I conclude that there is no principled way to distinguish the case at bar from *Boeing*. Surely in *Boeing* there were factors which under a "liberal" construction of the FAA militated in favor of consolidation. The case arose out of damage during ground testing to a helicopter owned by the United Kingdom. Boeing built the helicopter and Textron, Inc. built its engine. Presumably each company blamed the other for the accident, although the court of appeals' opinion does not say so expressly and the district court proceedings were sealed. Boeing and Textron had separate contracts with the United Kingdom containing identical arbitration clauses. The United Kingdom asked Boeing and Textron to agree to a consolidated arbitration. The desired benefits to the United Kingdom were apparent, including the avoidance of inconsistent awards. Boeing refused. The United Kingdom petitioned this Court (Stanton, J.) to order a consolidated arbitration. Judge Stanton did so, on the authority of *Nereus*, entered judgment accordingly, and stayed his judgment pending appeal. The Second Circuit overruled *Nereus* and reversed. The case at bar cannot be distinguished from *Boeing*.

The remaining question is whether respondents are procedurally barred from raising the point. North River says that the Reinsurers' failure to appeal from this Court's May 23 and July 19, 1991 opinions and orders calls into play the law of the case doctrine, so that the consolidated arbitration directed by the May 23 opinion is invulnerable to attack. In addition, North River contends that the particular circumstances of this case do not fall within the FAA's limited grounds for vacating an award; and that the Reinsurers are barred by the equitable doctrines of waiver and estoppel. These arguments are not persuasive.

It is not at all clear that this Court's May 23, 1991 opinion and order directing consolidation was appealable. In *Boeing* Judge Stanton entered a judgment on his consolidation order; the court of appeals concluded that in that circumstance it had jurisdiction under 28 U.S.C. § 1291. In *Nereus* the court of appeals did not articulate the basis for its jurisdiction over the unsuccessful appeal from the district court's consolidation order. Perhaps the court regarded it as an interlocutory decree in an admiralty case, appealable under § 1292(a)(3). The case at bar is not an admiralty case. In any event, the 1988 amendments to the FAA, 9 U.S.C. § 16, cast doubt on the appealability of this Court's prior orders. § 16(b)(2) provides that except as otherwise provided in 28 U.S.C. § 1292(b), an appeal may not be taken from an interlocutory order "directing arbitration to proceed under section 4 of this title." In its original petition North River invoked 9 U.S.C. § 4, and my May 23, 1991 order directed "arbitration to proceed" in a consolidated form. Certification of an interlocutory appeal under § 1292(b) was neither sought nor granted.

Quite apart from these technicalities, the Second Circuit has made it plain that the law of the case doctrine may have no legitimate office to perform where a fundamental change in the governing law impacts directly upon the parties' rights and obligations. *See Crane Co. v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979) (law of case doctrine did not require court of appeals to adhere to its prior holding that securities plaintiff had standing to sue, in light of Supreme Court's subsequent ruling that such plaintiffs lacked standing). The rationale of *Crane* renders inconsequential whether my May 23, 1991 order should be regarded as final or interlocutory, a question on which the parties expend much energy in their briefs. I apply the reasoning of *Crane* to the case at bar. I retained jurisdiction over this case to adjudicate any post-award applications. I am now presented with cross-motions to confirm and vacate the award. This court has not yet entered a final judgment. The Second Circuit's

decision in *Boeing* announces a fundamental change, binding upon me, in that court's view of the propriety of consolidated arbitrations. What *Nereus* praised and encouraged, *Boeing* casts into outer darkness beyond hope of redemption. My order of consolidation, while correct under *Nereus*, must be perceived in the light of *Boeing* as improvidently made. Absent their consent, respondents could not legally be forced into a consolidated arbitration. They are entitled to redress at the hands of this court.

North River's invocation of waiver and estoppel depends primarily on the timing of the *Boeing* decision, dated June 29, 1993. North River chides respondents for keeping the decision and its rationale up their sleeves until the award came down against them on August 21, 1993. But the law reporting company upon which the profession relies did not publish *Boeing* in written form until September 13, 1993, after the award. It is in such advance sheets that recently decided cases are for the first time indexed and cross-referenced with respect to statute, rule and subject matter. The respondents' reply papers stop short of claiming that counsel did not know of the *Boeing* decision until after the award; and it was possible for them to learn of it earlier, through slip opinions disseminated by the court of appeals or the electronic marvels of this new computerized age. But the arbitration hearings, after prolonged discovery, were scheduled to begin on July 9, 1993, only ten days after the Second Circuit decided *Boeing*. I see nothing in this chronology or in any of the other circumstances of the case sufficient to raise an equitable bar against the relief respondents seek.

I think that these rather special circumstances require vacatur of the award and a remand for separate arbitrations *de novo*, whether or not the case falls precisely within one of the grounds for vacatur specified in § 10 of the FAA. But if such a ground is necessary to the result, I conclude that the arbitrators in the consolidated arbitration exceeded the powers conferred upon them by the parties' contracts, in violation of § 10(d). To be sure,

the arbitrators acted in fulfillment of this Court's order; but *Boeing* makes it clear that, in all innocence, I exceeded my powers; and since the arbitrators derived their powers from my order, so did they.

Since there must be new and separate arbitrations, I do not reach the respondents' alternative grounds for vacatur based upon alleged improprieties in the conduct of the prior arbitration hearings.

It is in one sense regrettable that the time and resources expended on the first arbitration may have been partially wasted, although one hopes that by stipulation or otherwise much of the evidence discovered and presented may be utilized at the new arbitrations. However, the governing principle must be that declared by the Second Circuit in *Boeing* at 998 F.2d 70: "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" (citing and quoting *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468, 478 (1989)). Because the respondents at bar did not agree to a consolidated arbitration and objected to its imposition upon them, I am compelled to vacate the award. I have considered all of North River's arguments. They do not alter this conclusion.

For the foregoing reasons, the petitioner to confirm the arbitration award is denied. Respondents' cross-motion to vacate the award is granted. The parties are directed to proceed with separate arbitrations consistent with this Opinion. This Court retains jurisdiction.

It is SO ORDERED.

Dated: New York, New York
July 13, 1994

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN
THE NORTH RIVER INSURANCE COMPANY
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Counsel for the parties have forwarded to the Court the names of two potential third arbitrators. They have followed the procedure directed in the Court's Memorandum Opinion and Order dated May 23, 1991, at slip op. 4.

The two candidates are Mr. Paul R. Whitters and Mr. David J. Sherwood.

I have considered the resumes of these two gentlemen, and the comments that counsel offer concerning them. The most recent correspondence of counsel reflects a consensus, amply justified, that both Mr. Whitters and Mr.

Sherwood are well qualified to serve as an arbitrator in this important case, and I am grateful to both of them for their willingness to serve.

I must perforce choose one or the other. After careful consideration, the Court designates David J. Sherwood as the third arbitrator.

I direct the arbitration to go forward in accordance with the provisions of the May 23, 1991 Memorandum Opinion and Order.

The Clerk of the Court is directed to place this case on the suspense docket. This Court will retain jurisdiction in the event of any post-award proceedings.

It is SO ORDERED.

Dated: New York, New York
July 19, 1991

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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90 Civ. 7002 (CSH)

IN THE MATTER OF THE ARBITRATION BETWEEN
THE NORTH RIVER INSURANCE COMPANY
Petitioner,

-against-

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT No. R64939,
Respondents.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Arbitration is intended to achieve prompt and inexpensive resolution of commercial disputes. But this petition under the Federal Arbitration Act, 9 U.S.C. §§ 4 and 5, and its related motions, cross-motions, and counterclaims, give further proof, if more were needed, that even getting an arbitration under way can be time-consuming and expensive.

This Memorandum and Order resolves all pending motions. As Judge Medina said in somewhat comparable circumstances: "It is our hope that the parties will now get down to business." *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966, 976 (2d Cir. 1975).

I.

The motion of Reinsurance Corporation of New York ("ReCo") to intervene in this statutory "equitable proceeding," *Nereus, supra,* at 974, is granted under Rule 24(b)(2), Fed.R.Civ.P. The procedural objection to intervention made by North River Insurance Company, that at the time of its motion to intervene ReCo was not involved in an arbitration with North River, was frail at best, and is in any event mooted by ReCo's recently filed notice of arbitration.

II.

ReCo has appointed Joseph Murphy as its arbitrator, and has consented in advance to North River's naming Vincent Vaccarello as its arbitrator. These are the same arbitrators appointed by North River on the one hand and the U.S. Reinsurers (Philadelphia Reinsurance Corporation, Assicurazioni Generali, and Excess and Casualty Reinsurance Association) on the other hand. In these circumstances, I direct the consolidation of the North River-ReCo arbitration with the arbitration between North River and the U.S. Reinsurers.

III.

I also direct that this arbitration be consolidated with North River's arbitration with the London Reinsurers. I make that further order of consolidation on the authority of *Nereus* and the factors articulated by the Second Circuit at 527 F.2d 974: "That the consolidation was in the interest of justice is overwhelmingly demonstrated. There were not only common questions of law and fact in the two arbitrations but there was danger of conflicting findings . . ."

In the case at bar, there is no sound reason to risk conflicting findings as to the proper definition of "occurrence" as that word appears in Article VI of the reinsurance treaty. While the aggregate extension endorsement of the London Reinsurers amends Article V in a manner

unique to those underwriters, the crucial Article VI definition is common to both treaties; and the sophisticated panel of arbitrators which will hear the cases should be able without difficulty to address any additional questions peculiar to the London Reinsurers. The benefits of a consolidated arbitration far outweigh any complications arising from a peripheral difference in the treaties.

Because the London underwriters have also selected Mr. Murphy as their arbitrator, I do not confront the issue of composition of the consolidated arbitration panel which the Second Circuit had to resolve in *Nereus* at 975-76.

There is no substance to the London Reinsurers' contention that North River's limited prior participation in proceedings under the N.Y. CPLR divest this Court of jurisdiction, or preclude North River from invoking the Federal Arbitration Act. *See Sears Roebuck & Co. v. Glenwal Co.*, 325 F. Supp. 86 (S.D.N.Y. 1970) (Weinfeld, J), *aff'd*, 442 F.2d 1350 (2d Cir. 1971).

IV.

The consolidated arbitration panel will be completed in the manner suggested as an alternative by the U.S. Reinsurers in their reply brief dated January 19, 1991 at 11-13. The arbitration clause provides that "the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen." As noted *supra*, North River selected Mr. Vaccarello as its arbitrator, and all the reinsurers in the arbitrations, now consolidated, selected Mr. Murphy as their arbitrator. Accordingly, under the arbitration agreements, it is the responsibility of Messrs. Vaccarello and Murphy to choose the third arbitrator if they can. Indeed, I will given [sic] them an additional twenty (20) days from the date of this Memorandum and Order to attempt to do so. If they cannot, then I direct that within thirty (30) days of the date of this Memorandum and Order, Messrs. Vaccarello

and Murphy exchange lists of three proposed arbitrators. They are not limited to names previously submitted. I free them from that limitation because I have expanded the boundaries of the consolidated arbitration. Fifteen (15) days after the exchange of these lists, each arbitrator may strike two candidates from the other arbitrators' list. The remaining names, together with appropriate biographical material, will then be forwarded forthwith to the Court for selection of the third arbitrator.

My hope is that Messrs. Vaccarello and Murphy may yet be able to agree on the third arbitrator, which was the intent of the arbitration agreements; but if they cannot, this procedure will accomplish the task with a minimum of delay.

It is SO ORDERED.

Dated: New York, New York
May 23, 1991

CHARLES S. HAIGHT, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of October one thousand nine hundred and ninety-five.

94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

A petition for rehearing having been filed herein by Appellee: Philadelphia Reinsurance Corporation et al.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August, one thousand nine hundred and ninety-five.

PRESENT: HON JAMES L. OAKES
HON. RICHARD J. CARDAMONE
HON. FRANK X. ALTIMARI,
Circuit Judges.

Docket No.: 94-7784

THE NORTH RIVER INSURANCE COMPANY,
Petitioner-Appellant,

v.

PHILADELPHIA REINSURANCE CORPORATION, ASSICURAZIONI GENERALI, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, and UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S AND FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Respondents-Appellees,

THE REINSURANCE CORPORATION OF NEW YORK,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York

MANDATE

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is reversed and the matter remanded to the said district court for further proceedings consistent with the opinion of this Court, with costs to be taxed against the appellees.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

Issued as Mandate. 10/25/95

APPENDIX G

TITLE 9. ARBITRATION

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agree-

ment or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel

and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is

filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the some [sic] force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.